

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS No. 1399 of 2005.

IN

SUIT No. 2898 of 2001.

Ansal Housing and Construction
Ltd.

... Plaintiffs.

Versus.

Khandelwal Manufacturing Corp
Ltd. (KMCL)

... Defendants.

Mr. Mahendra Shah, Senior Advocate i/b Dalal &
Company for plaintiffs.

Mr. Shekhar Shetye i/b. Haresh Ganatra & Co for
defendants.

CORAM : S.C.DHARMADHIKARI,J

DATE : 5th June,2006.

P.C.

1] The Chamber summons is taken out by plaintiffs for an injunction restraining judgement debtors from selling, alienating, encumbering, creating any third party rights or parting with possession of the properties described in the Schedule annexed to the Chamber Summons.

2] Mr. M. H. Shah, learned Senior Counsel appearing for decree holders contends that in the above suit, in which present execution application has been filed, parties tendered consent terms. He invites my attention to consent terms dated 11th December, 2004, pursuant to which a decree came to be

passed in the suit. In his submission, the consent terms and more particularly, clauses 3 to 5 would provide sufficient guide for the claim made by the original plaintiffs that if defendants fail to deliver the first lot of T.D.R. or approximately 40,000/- sq. ft. by 31st October, 2005, time being essence, the plaintiffs are entitled to invoke their rights and remedies specified in clause 10. In the submission of Mr. Shah, the substance of consent decree is that defendants agree to deliver first lot of T.D.R. or 40,000/- sq. ft. on or before 31st October, 2005. However, by a supplementary agreement dated 29th April, 2005, it is agreed between plaintiffs and defendants that the defendants would inter alia transfer in favour of plaintiffs, first lot of T.D.R. of 40,000/- sq. ft. on or before 30th June, 2005. Mr. Shah submits that by their Advocate's letter dated 11th October, 2005, defendants while assuring plaintiffs that they are doing their best to fulfill their commitment under the consent terms and making efforts to deliver first lot of T.D.R. wrongfully demanded a sum of Rs. 46 lakhs from plaintiffs. The demand was on the ground that this sum is payable to Municipal Corporation. However, this demand is deferred by B.M.C. He invites my attention to the correspondence in this behalf and submits that as per the original agreement and the consent terms,

defendants are liable to deliver to the plaintiffs, the T.D.R. of 80,000 sq.ft. in two lots of 40,000 sq.ft. at the rate of Rs.500 to 525 respectively. However, the market price of the T.D.R. is more than Rs.1000/- per sq.ft. Plaintiffs had not learnt anything from defendants about their having obtained T.D.R. from Corporation. In the submission of Mr. Shah considering current market ratio and price, defendants are not interested in honouring their commitments. Mr. Shah submits that by the letters which are addressed on 29th September 2005 and 11th October 2005, it is obvious that defendants have exercised their option of delivering T.D.R. to plaintiffs. Plaintiffs are and have always been ready and willing to accept the same. However, it is the defendants who are not interested in honouring their obligations. In these circumstances, and when the defendants have exercised their option of delivering T.D.R. but having failed to do so, levy of attachment on the properties being a time consuming process, injunction as prayed for in the chamber summons be granted. Mr. Shah submits that otherwise decree would be a paper decree.

3] Mr. Shah has laid special emphasis on clause 10 of Consent Terms. In his submission, the said clause is clear, inasmuch as, the defendants

failing to procure and provide the first lot on or before 31st October 2005, then, there is no question of any option for defendants. He submits that Exh.3 to the affidavit in support (letter dated 19th September 2005 of B.M.C.) would definitely show that there is no benefit of FSI/TDR because there is no compliance of the conditions. The plaintiffs have paid a sum of Rs. 1.52 crores in 1994. There is no question of any option to the defaulter. In other words, defendant being defaulter, the option is not to it but it is their obligation. He submits that there is no disposal or transfer of T.D.R. The malafides are absolutely clear. There is huge claim of plaintiffs. The amounts are lying with interest. He submits that clause 6 if is read in entirety, then, it is clear that the plaintiffs shall be entitled to invoke their rights and remedies specified in clause 10, upon failure of defendants to deliver first lot of T.D.R. of 40,000 sq.ft. Admittedly, time is essence of the contract. He invites my attention to clauses 6 and 8 which categorically states that plaintiffs have exclusive right to T.D.R. in respect of land admeasuring 3681.25 sq.mtrs.being part of the larger property at Bhandup. Therefore, the chamber summons be made absolute.

4] Mr. Shah in support of his submissions

relies upon the decision of the Supreme Court in the case of Dr. Renuka Datla (Mrs) Vs. Solvay Pharmaceuticals B.V. and Ors. reported in A.I.R. 1959 S.C. 24 and in the case of Khardah Company Ltd Vs. Raymon & Co. (India) Pvt. Ltd. A.I.R. 1962 S.C. 1810. According to him, the well settled principle which has been laid down in these decisions would apply with equal force in this case. He submits that while construing the contract, it would be legitimate to take into account surrounding circumstances. He submits that an interpretation which defeats the consent terms and the rights of plaintiffs thereunder, should not be placed on the aforesaid clauses.

5] On the other hand, Mr. Shetye appearing for defendants submits that there are no mala-fides. Defendants have agreed to refund the sum of Rs. 1.52 Crores and further sum of Rs. 10 and 24 lakhs. They are ready and willing to refund the amounts even now. He submits that there is no T.D.R. available and despite best efforts of the defendants, it could not be procured by them. He submits that the chamber summons is totally misconceived and there is no question of interpretation of any terms. He submits that the supplementary agreement should also be seen in this case and if that is seen, nothing can be

added, more particularly, by interpreting the consent terms.

6] Mr. Shetye relies upon the decisions of the Supreme Court in the case of Oil & Natural Gas Corporation Ltd. Vs. Saw. Pipes Ltd., reported in (2003) 5 S.C.C. 705 and in the case of Rekha Mukherjee Vs. Ashish Kumar Das & Anr. reported in (2004) 1 S.C.C. 483 and in the case of Dr. Renuka Datla (Mrs.) Vs. Solvay Pharmaceuticals B.V. and Ors., reported in (2004) 1 S.C.C. 149.

7] With the assistance of Mr. Shah and Mr.

Shetye, I have perused the chamber summons, affidavit in support and the annexures thereto. I have also perused the affidavit in reply and noted its contents.

More particularly, paras 5 and 14 thereof.

8] From a perusal of the above materials and

the consent terms, it is crystal clear that the suit was settled between parties in the manner provided therein. The defendants agree, admit and acknowledge that a sum of Rs. 1.52 crores was paid by plaintiffs to the defendants for purchase of 80,000 sq.ft. of T.D.R. This is to be generated in respect of larger property owned by defendants and situate at village Bhandup. The sale was to be in two lots of 40,000 sq.ft each. The total consideration for the same is Rs. 4.10 Crores. Payment of the aforesaid sum is in two stages. Clause 3 provides for these stages. Clause 3 is divided into two sub-clauses. While it is true that all payments to be made by plaintiffs to

defendants were to be strictly in accordance with the schedule and time being essence, it is agreed between parties that plaintiffs shall make payment to the Municipal Corporation on behalf of defendants in the sum of Rs. 46 lakhs. Clause 6 which makes time the essence of the contract, provides that if the first lot is made available within the time stipulated, then, as far as second lot is concerned, time can be extended. It is, thereafter, that the question of plaintiffs invoking their rights and remedies specified in clause 10 would arise. Upon declarations that are given in clause 7 which follows clause 6, the parties further agree that plaintiffs would get exclusive rights to the T.D.R. Clause 9 is once again providing for time to be the essence of contract. Clause 10 which follows is worded by parties to mean that if for any reason the defendants are not able to procure and provide to the plaintiffs the first lot of T.D.R. on or before 31st October 2005, defendants give undertaking to the Court that they have option to refund Rs. 1.52 Crores and to refund on or before 30th April, 2006, the amounts mentioned in clause 10(b) but this shall not prejudice other rights and remedies of plaintiffs. Clause 11 provides for interest on delayed payment of sums mentioned in clause 10(b). Clauses 12 to 15 have no bearing as far as the controversy in the present chamber summons.

9] Thus, consent terms dated 11th December 2004 incorporate the agreement between parties for procurement of T.D.R., time allowed for procurement and transfer and the consequences if the same could not be procured and transferred within the time stipulated by parties. The undertaking to the court on the part of the defendant is to refund the monies and even if such refund is to be taken as an option on their part, the said refund will not prejudice rights and remedies of plaintiffs which are otherwise available to them in law.

10] Once the terms and conditions of the above referred consent terms are noted together with obligations of defendants thereunder, then, it is not possible to agree with Mr. Shah, learned Senior Counsel that there is no question of any option on the part of a defaulter and the right of plaintiff under clause 10 is absolute.

11] It is also not possible to agree with Mr. Shah that clause 10 must be construed in the light of the clear wording of clause 6 and the word option appearing in clause 10 cannot, therefore, control its interpretation and implementation. In my view, clause

6 which provides for time periods within which the rights have to be procured by defendants keeps open the right of plaintiffs to invoke clause 10 even if it is agreed that as far as second lot of T.D.R. time can be extended beyond the period specified in the consent terms. The true import of clause 6 is that merely because the plaintiffs agree to extension of time, does not mean that they have lost their rights completely. So also time being extended does not mean that there is no obligation on the defendants to comply with clause 10. Thus, the consent terms make all options available to parties.

12] Parties are aware that procurement of T.D.R. in respect of larger property is something which is not within their exclusive powers and control. Such grant is to come from Municipal Corporation under the relevant planning laws and rules. All that can be done by parties is to apply for procurement and transfer of such rights. It is only if defendants procured them, then the question of transferring them would arise. If the defendants fail to procure them, clear intent of parties is that they should not pocket Rs. 1.52 Crores but refund the same to plaintiffs within the time stipulated in clauses 10 and 11, failing which they are liable to pay interest at the rate determined therein. At the same time, the

intention is not to prejudice and take away plaintiffs' rights and remedies in law. Hence even after payment of the sums by the defendants and receipt thereof by plaintiffs, it is not as if the plaintiffs cannot exercise their other rights and avail of such remedies as are open to them in law.

13] Intent and spirit behind the consent terms

having been noticed, it is not possible to agree with Mr. Shah that the consent terms need to be interpreted in the manner suggested by him. On the other hand, Mr. Shetye is justified in submitting that this is not a case of interpretation of the consent terms. In this behalf his reliance upon supplementary agreement is also justified. The entire position has been set out by the defendants on affidavit and it does not appear to be running contrary to the consent terms. In para 12 of the affidavit in reply, it has been categorically stated by the defendants that they have exercised their option as provided and agreed to in clause 10(a) and are ready and willing to pay to the plaintiffs the sum of Rs. 1.52 Crores as also further sums on or before 30th April 2006. In fact, Mr. Shetye, upon taking instructions from defendants makes a statement that even other sums would be refunded.

14] The well settled principle that the Court cannot by interpretative process add to or superimpose any terms on parties is applicable in this case. The reliance placed by Mr. Shetye on the decision of the Supreme Court reported in (2004) 1 S.C.C. 149 (supra) and para 13 thereof is appropriate. The parties were under legal advice and it is not possible to uphold the contention that the implications of the consent terms were not understood by them or that they are vague or ambiguous so as to call in aid principles of interpretation placed before me by Mr. Shah. On the other hand, having read the consent terms with their able assistance, I do not find any ambiguity therein. All eventualities are taken care of and provided for in the consent terms. It is not as if parties have left out something. Thus, keeping all remedies of plaintiffs so also contentions therein open, I proceed to dismiss the chamber summons. The chamber summons is accordingly dismissed. My observations shall not influence the outcome of other proceedings, if initiated by plaintiffs.

15] In the above circumstances, it is not possible to grant any relief in the chamber summons. In my view, the chamber summons is not an appropriate remedy.

16] Since the chamber summons is being dismissed, I see no point in continuing the ad-interim order which was passed on this chamber summons on 28th October, 2005 indefinitely. The same to continue till the amounts under Clause 10(a) and (b) are refunded by defendants.

(S.C.DHARMADHIKARI,J)